UNITED STATES OF AMERICA

BEFORE THE MERIT SYSTEMS PROTECTION BOARD

In the matter of: MARY E. LANGE v. DEPARTMENT OF TRANSPORTATION	Docket No. PR-80-7-80

OPINION AND ORDER

The appellant was selected by the agency for promotion to the position of Contract Specialist, GS-1102-5. The position had been announced as a GS-5/7 position, indicating that a selectee at the GS-5 grade level might be promoted noncompetitively if certain conditions were met. Thereafter, the former Civil Service Commission advised the agency that the promotion was improper in that appellant did not meet the Commission's qualification standards for the position, and that the appellant could not be retained in the position as there were other applicants eligible for consideration and selection for the position. The agency subsequently informed the appellant that it could either reassign her under competitive procedures to another position or initiate adverse action procedures. The appellant was thereafter selected for, and reassigned to, the position of Procurement Clerk (Typing), GS-1106-5. The appellant appealed to the St. Louis Field Office, alleging that, as she had been reassigned from, in effect, a position with known promotion potential to a position with no promotion potential, the action constituted a reduction in grade under the provisions of 5 U.S.C. 7512(3). The presiding official's initial decision found that the matter appealed did not constitute an adverse action and, accordingly, dismissed the appeal. The petition for review argues that the public policy behind 5 U.S.C. 7512(3) requires that appellant be afforded the procedural safeguards that the Civil Service Reform Act was designed to provide. The agency's response to the petition relies on the record and the decision of the presiding official.

A reduction in grade constitutes an adverse action under 5 U.S.C., Chapter 75. 5 U.S.C. 7512(3). An employee against whom such an action is taken is entitled to appeal to the Board. 5 U.S.C. 7513(d). While the law does not define the term "reduction in grade," "grade" is defined as "a level of classification under a position classification system." 5 U.S.C. 7511(a)(3). The interim regulations of the Office of Personnel Management (OPM) provide

no further definition of a reduction in grade. *See* 44 Fed. Reg. 3445 (1979). Similarly, the final OPM regulations do not define a reduction in grade. *See* 44 Fed. Reg. 47034 (1979) (to be codified in 5 C.F.R. 752.402).

It is clear that the appellant was not *per se* reduced in grade as she was reassigned from a GS-5 position to a position at the same grade level. The appellant, however, argues that the Reform Act and its legislative history support her belief that her reassignment was a reduction in grade. Specifically, appellant argues, *inter alia*, that the public policy behind 5 U.S.C. 7512(3) requires that "protection be given the individual who experiences a dramatic change in his or her employment life." The petition for review states that:

> (i)t is just as traumatic a change to be moved from one position classification where one is virtually assured of being promoted in the minimal amount of time to a completely different classification of job with different duties where one is virtually assured of never receiving a promotion in that position.

The appellant argues, in effect, that an individual assigned under such circumstances must be afforded the procedural safeguards of the Reform Act. The appellant's argument appears to be that, where there is an expectancy of promotion in a given position, reassignment from that position to a position without such promotion expectancy constituted an adverse action. Had appellant been promoted to GS–7, there is no question but that her assignment to a GS–5 position would have constituted a reduction in grade under 5 U.S.C. 7512. She was not promoted, however, and in our judgment, her expectancy of promotion cannot reasonably transform her reassignment into an adverse action subject to the requirements of 5 U.S.C. 7513(d). The appellant's expectation that she would have been promoted noncompetitively from GS–5 to GS–7 does not provide a legal basis for considering her to have been the incumbent of a GS–7 position. She would not have been entitled to the pay of the higher-graded position until she had been duly appointed or promoted to that position, as it is well settled that an employee is entitled only to the salary of the position to which officially appointed. *See, e.g. Bielec* v. *U.S.*, 456 F.2d 690 (Ct. Cl. 1972). Similarly, the Supreme Court noted in *U.S.* v. *Testan*, 424 U.S. 392 (1976), "the established rule is that one is not entitled to the benefit of a position until he has been duly appointed to it." Id. at 402, (citations omitted). Appellant, therefore, was clearly not entitled to the pay or the benefits of the GS–7 position. Moreover, while she may have believed she would have been promoted, her expectations in this regard were purely speculative, as a Federal employee has no absolute entitlement to promotion. In *U.S.* v. *Applegate*, 207 Ct. Cl. 941,999 (1975), employees of the United States Customs Service were hired at the GS–7 level, and were assured promotion to the

level of GS–9 in one year provided that all requirements were met. Promotion to this level was delayed from two to three months as a result of a freeze on promotions of virtually all Federal civilian employees ordered by the President on December 11, 1972. The court denied the claim for the difference in pay for the period during which the promotions were delayed. This decision recognizes that even in those situations where all conditions for a promotion were met, there is no absolute right to a promotion. In view of the foregoing, and noting that the Civil Service Commission found that appellant did not meet its qualification standards for promotion to the position in question at the GS–5 level, we find no basis upon which appellant could have reasonably expected to have an absolute entitlement to promotion and we conclude that appellant was *not reduced in grade when she was reassigned.*

We note appellant's contention that the legislative history of the Reform Act supports her belief that her reassignment was a reduction in grade. She does not cite, however, and we have not found, any portion of the legislative history of the Act which supports her contention in this regard. In fact, the Reform Act reflects Congress' specific intention that a reduction in rank, which involved a change in an employee's relative position in an agency not involving a reduction in pay or grade, no longer constituted an adverse action. *See Civil Service Reform Act of 1978: Report on the Committee on Post Office and Civil Service on H.R. 11280,* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 22 (1978).

In view of the foregoing, we find that the presiding official correctly decided that the instant appeal did not constitute an adverse action. We further find that appellant's reassignment did not constitute a reduction-in-grade under 5 U.S.C. 7512(3) and that the action, therefore, is not appealable to the Board under 5 U.S.C. 7701.

Accordingly, the petition for review of this case is hereby DENIED.

This is the final decision of the Merit Systems Protection Board.

Appellant is hereby notified of her right to seek judicial review of the Board's final decision by filing a civil action in the U.S. Court of Appeals for the appropriate circuit or in the Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

WASHINGTON, D.C., *March 24, 1980.*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

St. Louis Field Office

MARY E. LANGE
APPELLANT
v.
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD
1430 OLIVE STREET
ST. LOUIS, MISSOURI 63103

AGENCY

Decision Number: SL075299019

Decided on: September 7, 1979

INTRODUCTION

On July 13, 1979, Ms. Mary E. Lange appealed the agency action competitively reassigning her from the position of Contract Specialist, GS–1102–5, to the position of Procurement Clerk (Typing), GS–1106–5, effective March 12, 1979, based upon a finding by the former Civil Service Commission that appellant's promotion to the former position involved a regulatory violation, to wit, that she did not meet the X-118 Qualification Standards.

JURISDICTION

Appellant alleges that her reassignment from a GS–5/7 position (that is, a position featuring a possibility of noncompetitive promotion to the higher grade) to another GS–5 position not having such noncompetitive promotion possibilities constitutes a reduction in grade under the provisions of 5 U.S.C. 7512(3). She theorizes that the action taken was an adverse action based upon both the legislative history behind the Civil Service Reform Act and the strict language of the act itself. The essence of her argument is that a GS–5/7 position is a higher graded position than a mere GS–5 position.

The first question to be resolved is whether the lateral reassignment of appellant from a GS–5 position with noncompetitive promotion potential to a GS–5 position having no such promotion potential constitutes a reduction in grade. The Civil Service Reform Act, as codified in 5 U.S.C. 7512(3), provides that reductions in grade are actions covered by Subchapter II of Chapter 75, Adverse Actions. The law does not specifically define the term

"reduction in grade." However, the definitions section of the Civil Service Reform Act (5 U.S.C. 7511(3)) does define "grade" as "a level of classification under a position classification system."

The interim regulations of the Office of Personnel Management do not further define the concept of reduction in grade; in fact, Office of Personnel Management Regulation 752.401 merely reiterates the adverse action coverage specified in the law.

While the appellant has cited the language of the Reform Act itself and the legislative history as supporting the proposition that her reassignment was a reduction in grade, the Act's definition of "grade" as "a level of classification under a position classification system" implies that a reduction in grade would be a reduction from one level of classification (for example, GS–9) to a lower level of classification (for example, GS–7). There is nothing in the law itself or the available legislative history to suggest, as appellant contends, that a reduction in grade would include a lateral reassignment under the peculiar circumstances involved in the present case, that is, a reassignment from a position having promotion potential to one not having promotion potential.

Concerning the question of whether appellant's reassignment constituted a reduction in rank, turning to the legislative history, the agency states, in its submission, that: "Congress clearly did not intend by the 1978 Reform Act to expand the meaning of the term 'grade' to further encompass changes in job titles, job series, or duties." While the agency does not cite the legislative history which is quoted, its interpretation of the legislative history behind the Civil Service Reform Act of 1978 is accurate (Report of the Committee on Post Office and Civil Service on H.R. 11280, To Reform the Civil Service Laws, July 31, 1978, p. 22; Conference Report on S.2640, Civil Service Reform Act of 1978, Congressional Record, Volume 124, Number 160, Thursday, October 5, 1978, p. H11659). The cited materials clearly establish that the concept of reduction in rank, as divorced from the concepts of reduction in grade or pay, is no longer to be considered an adverse action.

Accordingly, assuming *arguendo* that the reassignment of appellant constituted a reduction in rank, it would not be an action defined as an adverse action which would be appealable to the Merit Systems Protection Board under 5 U.S.C. 7512. Therefore, the question of whether the lateral reassignment constituted a reduction in rank will not be analyzed.

Accordingly, the lateral reassignment of appellant from one GS–5 position with a possibility of noncompetitive promotion to GS–7 to a GS–5 position having no such possibility of noncompetitive promotion is not found to be a reduction in grade appealable to the Merit Systems Protection Board under 5 U.S.C. 7512(c). Moreover, since alleged reductions in rank are no longer

appealable adverse actions, I will not analyze whether the lateral reassignment constituted a reduction in rank.

In view of the jurisdictional nature of this decision, no analysis will be conducted concerning the timeliness of appellant's appeal.

DECISION

Based on the foregoing analysis and the evidence of record, I find that the matter appealed does not constitute an adverse action within the definition of the Civil Service Reform Act (5 U.S.C. 7512). Therefore, it is not an action within the appellate jurisdiction of the Merit Systems Protection Board. Accordingly, the appeal is dismissed.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on October 12, 1979, unless a petition for review is filed with the Board within thirty-five (35) calendar days after the date of this decision.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office (5 U.S.C. 7701(e)(2)). The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419, no later than thirty-five (35) calendar days after the date of this decision.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tend to show that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Under 5 U.S.C. 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

JACK E. SALYER,
Presiding Official.